No. 20451

In The

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWIN JONES MONTGOMERY, SR., et al.,	)
Petitioner,	)
vs.	)
COMMISSIONER OF INTERNAL REVENUE,	)
Respondent.	)

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

The Tax Court exercised its "discretion" arbitrarily and will-ully, rather than reasonably and with due regard for all of the ircumstances, as required by law. Its decision should therefore be eversed, whether or not it could reasonably have arrived at the decisi(hich it reached.

ARGUMENT

A TRIAL COURT MUST EXERCISE ITS DISCRETION IN A LAWFUL MANNER; IT APPEARS FROM THE RECORD THAT THE COURT BELOW FAILED TO DO SO.

Almost all of respondent's brief is devoted to the propositio hat granting of a continuance is a matter that falls within the trial ourt's discretion, and to argument that there are facts in the record

tat could be said to justify the decision that the court reached. We aree with respondent upon the former point. We do not concede the ltter, nor is it necessary, however, that we contest it. The point uon which we insist is that the scope of review on a discretionary rling is broader than is implied by respondent's brief: an appellate ourt must reverse if it determines that the trial court in fact did not exercise its discretion in a lawful manner, even though, had the trial ourt done so, it could have arrived at the same decision.

The following remarks appear in an article dealing specifical th review of administrative decisions; the reasoning is nevertheless pplicable to the present circumstances:

> It is commonplace that in a given case the evidence may suffice to support a finding either way. The finding may be "against the weight of the evidence" and yet be valid because supported by "substantial" evidence. The factfinder must make a choice based on his own appreciation of the greater probability; and though it may not be clear from the authorities, I would suggest that the fact-finder should <u>believe</u> that the fact is "true," rather than merely make an objective judgment of its probability. Finding a fact involves a personal commitment. Merely because the evidence is "substantial", it does not follow that the finder of fact has properly understood his obligation; and if it is evident that he has not, the case should be remanded to him <u>despite the fact that the evidence is substantial</u>. (Emphasis in original)
>
> Jaffe, <u>Administrative Law: Burden of Proof and Scope of Review</u>, 79 Harv. L. Rev. 914, 915 (1966).

To paraphrase the last sentence of the foregoing passage in terms applicable to the present situation: even if there are facts of record upon which the court could have based a discretionary ruling adverse to

petitioner, it does not follow that the court has properly understood a honored its obligation; and if it is evident that it has not, the case should be remanded despite the existence of such facts. To affirm where a reasonable man could, at trial, have decided the case either way, but where it appears that the trial court in question did not understand or did not perform its obligation properly, would be to deprive the litiga of a necessary step in the judicial process. Petitioner herein was entitled to have the question raised by his requested continuance decided by a judge exercising judicial discretion; it is that step of which he was deprived by the court below.

In Janousek v. French, 287 Fed.2d 616 (8th Cir. 1961), cited by respondent on page 14 of his brief, the court, at page 621, quoted from Bowles v. Goebel, 151 Fed. 2d 671, 674 (8th Cir. 1945), the following description of the duty of an appellate court in reviewing an exercise of discretion:

> . . . (T)he process of an appellate court in examining exercised discretion for abuse is not one of creating prescriptions and definitions for the curbing of judment generally, but simply one of viewing the action taken in an immediate case in the relativeness of its entire situation to see whether it compels the conviction that there has not been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation. (Emphasis added)

To demonstrate that petitioner herein was deprived of the required "responsible exercise," it is first necessary that we discuss briefly what, in the judicial context, is meant by the term "discretion." Respondent has cited, on page 13 of his brief, the case of Langnes v. Green, 282 U.S. 531 (1931) in support of the proposition that "discretion indicates the absence of a hard and fast rule." The passag

upon which respondent relies goes on to define "discretion" as follows:

> When invoked as a guide to judicial action it means a sound discretion, that is to say a discretion exercised not arbitarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.
>
> 282 U.S. at 541.

Judicial "discretion" has often been described in words of similar import; several definitions are set out in the Appendix, infra.

Did the Tax Court understand and honor its obligation to exercise discretion, as that term has been defined by the authorities cited above and in the Appendix? As petitioner has indicated in his opening brief, a careful reading of the record demonstrates that it did not. At a very early stage the court indicated that it had already decided that the taxpayer was engaging in dilatory tactics:

> . . . I think if we put it off it is going to be the same thing when it comes up again . . . . (II-B Tr. 10).

This remark was made at a time when the record before the court showed, by written motion of petitioner's counsel (I-A Tr. 57) and by declarations under penalty of perjury of petitioner (I-A Tr. 67) and of the director of the bureau for which petitioner worked (I-A Tr. 69), that petitioner, in the months immediately preceding the trial, was working on a very heavy schedule, including nights and weekends, for the Nevada Legislature and accordingly had not been able to make necessary trips to Arizona and California to gather and organize relevant documentation. These facts were not directly controverted by respondent, who

contended himself with charges that petitioner had failed since 1959 to substantiate the deductions claimed, that petitioner was only trying to "delay and procrastinate," that petitioner had "successfully adopted the same delaying tactics in previous cases," and that the original and amended petitions filed by petitioner were false and defective (I-A Tr. 61-66, II-B Tr. 3-5).

Since the situation petitioner described clearly made it impossible for him to be ready for trial on the date in question (See petitioner's opening brief pages 8 and 9), and since petitioner's description of the situation was not controverted and respondent made no claim that delay would prejudice his case, a proper exercise of discretion would surely have resulted in the granting of a continuance at that time. The court's denial of petitioner's motion was not, however, as shocking a ruling as those which followed, since the court at this early stage may have believed that the choice lay between granting a continuance and forcing the petitioner to proceed on a make-shift basis with whatever evidence was immediately available. By the time the next ruling was made, however, the situation had altered: the court had made it clear that it was not going to accept the kind of proof petitioner was seeking to present, and petitioner had concluded that it would be pointless to proceed further. (See petitioner's opening brief page 12). The choice now facing the court was between continuance and dismissal.

It appears unequivocally from the record that the court did not consider this choice with an open mind; that its discretion was not

"directed by the reason and conscience of the judge to a just result," Langnes v. Green, 282 U.S. 531, 541 (1931), but rather was exercised "arbitrarily or willfully." Langnes v. Green, supra. On the last page of his brief, respondent finally meets petitioner's essential contentio on this point with the statement that "rarely does a court display a greater mastery of the facts and circumstances of a case than is evince by the instant record, particularly where the court summarized (II-B R. 94-122) the taxpayer's posture." (Respondent's brief, page 22.) The pages of the record referred to by respondent include petitioner's last renewal of his motion for continuance (II-B Tr. 94), respondent's motion for dismissal (II-B Tr. 112) and argument by counsel for both sides. (Petitioner's argument appears at II-B Tr. 102-3, 113-14, 116-17; Respondent's at II-B Tr. 103, 105-6, 109-11.) It is particularly noteworthy that, as pointed out in petitioner's opening brief at page 13, the court, in response to a question from petitioner's counsel frankly stated that it was not at this time reconsidering the motion for a continuance, but was merely seeking to "provide additional suppor for the reasonableness" of its action (II-B Tr. 104). Having made this statement, the court went on to insist that the record with respect to the history of petitioner's dealings with the Internal Revenue Service be expanded (II-B Tr. 104-111).

The court's remark makes crystal clear that which was implici in its remarks made two days earlier (See page 4, infra) and in remarks it made as the trial progressed (See Opening Brief, page 12)). The court made up its mind what it was going to do no later than within a

w minutes of taking the bench on the first day and never thereafter cor dered with an open mind the following facts: Petitioner had suffered financial debacle (II-B Tr. 44) and felt compelled to work extraordina urs to rehabilitate his position (I-A Tr. 79), many of petitioner's cords had been destroyed in a fire (I-A Tr. 79, 82, 83), petitioner d moved twice during the period in question (I-A Tr. 80), petitioner s and had been for several months heavily involved in duties with the vada Legislature (I-A Tr. 57, 67, 69), for all of these reasons cords which petitioner would need remained scattered and unorganized I-B Tr. 102, I-A Tr. 80), but petitioner was prepared to spend his ming summer vacation in preparation for trial and would be ready for ial at the fall session of the court (II-B Tr. 102, I-A Tr. 72, 81).

An open-minded court, bearing in mind that "(l)iberality hould be exercised in the granting of continuances to obtain the esence of material evidence and to prevent miscarriages of justice," Cohen v. Herbert, 186 Cal App. 2d 488, 493 (1960), might well have ecided that, in this instance, the interests of justice would best e served by allowing petitioner the continuance he requested. etitioner, having been denied the judgment of such a court, has been enied an essential step in the judicial process.

There is a factual inference in respondent's brief that is ot warranted and should be corrected; respondent relies heavily upon lleged "contradictory statements" of petitioner about his records Respondent's Brief pages 5, 6, 8, 15). Though some of petitioner's tatements may have been inartfully worded, none of them are

inconsistent with the full explanation about the records: Records accumulated prior to the fire on March 24, 1959 were destroyed, and will have to be reconstructed through the records of others. Records accumulated since that fire were moved from Sacramento to Carson City in August of 1964 and were not, at the time of trial, organized in a manageable form. Still other records are in Arizona (I-A Tr. 79-80).

None of the authorities cited by respondent deal with petitioner's contention that the trial court must exercise its discretion in a lawful manner; all are illustrations of the point, which petitioner does not dispute, that a ruling on a continuance is discretionary. Suffice it to say that all of respondent's authorities are factually distinguishable from the case at bar. In each of the following cases, substantial prejudice was shown by the party opposing the continuance: Vevelstad v. Flynn, 230 Fed.2d 695 (9th Cir. 1956); United States v. Pacific Fruit & Produce Co., 138 Fed.2d 367 (9th Cir. 1943); Girard Trust Co. v. Amsterdam, 128 Fed.2d 376 (5th Cir. 1942).

In each of the following cases, previous continuances had been granted; in Sweeney v. Anderson, infra, a further continuance was offered but the litigant failed to respond to the offer: Sweeney v. Anderson, 129 Fed.2d 756 (10th Cir. 1942); Grunewald v. Missouri Pacifi Railroad Co., 331 Fed. 2d 983 (8th Cir. 1964); Woodbury v. Commissioner, 231 Fed. 2d 121 (3rd Cir. 1956); Scholl v. Felmont Oil Corp., 327 Fed. 2d 697 (6th Cir. 1964); Miller v. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951).

In each of the following cases, the complaining party relied

upon a change of counsel immediately before trial as ground for a continuance: Miller v. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951); Brunson v. Hamilton Ridge Lumber Co., 122 S.C. 436, 115 S.E. 624 (1923) Berger v. Mantle, 18 Cal.App.2d 245, 63 Pac.2d 335 (1936).

In Hicks v. Bekins Moving & Storage Co., 115 Fed. 2d 406 (9th Cir. 1940), the complaining party was seeking to re-open a matter dismissal of which had been permitted without objection. In Andrews v. Hotel Sherman, 138 Fed. 2d 524 (7th Cir. 1943), the court held that the complaining party had not been prejudiced by the denial of a continuanc In Baltimore American Ins. Co. v. Pecos Mercantile Co., 122 Fed. 2d 14 (10th Cir. 1941), a litigant represented by two well known law firms was complaining of inadequate representation based upon confusion over who was to prepare the case. Inderbitzen v. Lane Hospital, 17 Cal.App. 2d 103, 61 Pac.2d 514 (1936) involved a case which had apparently been delayed for eight years since it had been at issue. In Everts v. Will S. Fawcett Co., 3 Cal.App.2d 261, 38 Pac.2d 868 (1934), the defendant based its request for a continuance upon a desire to seek further evidence, the nature of which it was uncertain, from plaintiff.

Respondent's remaining authorities stand only for principles sufficiently general to be beyond dispute.

CONCLUSION

It appears from the record that the discretion of the Tax Cou was not "directed by the reason and conscience of the judge to a just result," Langnes v. Green, 282 U.S. 531, 541 (1931); petitioner was

therefore deprived of an essential step in the judicial process and the case should be reversed and sent back to the Tax Court with instruction that it be set for trial.

Dated, Oakland, California,

April 5, 1966

Respectfully submitted,

JOHNSTON & PLATT

By ROBERT D. PLATT
Attorneys for Petitioner

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT D. PLATT
Attorney for Petitioner

APPENDIX

Definitions of "Discretion"

1. The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.

   Bailey v. Taaffe, 29 Cal. 423, 424 (1866). (Cited on pages 6 and 8 of petitioner's Opening Brief.)

2. The Supreme Judicial Court of Massachusetts defined the term in Davis v. Boston Elevated Ry. Co., (1920) 235 Mass. 482 [126 N.E. 841, 843], as follows: "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just."

   In his work, "The Nature of the Judicial Process," Justice Cardozo wrote (p. 141):"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all

conscience is the field of discretion that remains." Certainly a decision rendered in disregard of fundamental facts upon which the parties were relying or based on facts not adduced at the trial, and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a judicial decision in the true sence.

Gossman v. Gossman, 52 Cal. App. 2d 184, 195-196 (1942).

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

ROBERT D. PLATT, being first duly sworn, deposes and says:

That he is a citizen of the United States, over the age of 18 and not a party to the within cause or proceeding; that he is employed in Alameda County and that his business address is 833 First Western Building, Oakland, California; that on April 5, 1966 he served three true copies of the attached Petitioner's Reply Brief by placing said copies in an envelope addressed to: RICHARD M. ROBERTS, Acting Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D.C. 20530, which envelope was then sealed and postage fully prepaid thereon, and thereafter, on said date, deposited in the United States mail at Oakland, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

ROBERT D. PLATT

Subscribed and sworn to before me
this 5th day of April, 1966.

SHARON D. GERRITS
Notary Public in and for said
County and State
My Commission Expires: 12/16/68